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## Trends In Commercial Development Of Ocean Resources: New Laws And Policies Present Opportunities And Risks – Part I

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**Editor's Note:** *This is the first of a two-part article on developments in ocean resources. Part I, in this issue, summarizes the near-term changes in off-shore renewable energy and alternative use development that will result from provisions in the Energy Policy Act of 2005. Part II, which will run in the next issue of MCC, relates to current efforts to address the international law framework governing marine genetic resources in the deep ocean.*

### Introduction

The United States is at a critical juncture in determining our future approach to the use and conservation of ocean resources. Economic activity involving our ocean and coastal resources represents over \$4.5 trillion, or approximately half of GDP. Over 90 per-

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cent of the world's oceans remain unexplored. At the same time, however, we are "loving our oceans to death." Key concerns include depleted fisheries that were once abundant, increased beach closings, coastal dead zones and other water quality problems from land-based and ocean activities, loss of significant coastal wetlands and estuary habitats to development and pollution, endangered marine life and the ecosystems upon which they depend, population trends that increasingly challenge our coastal communities, escalating demands on ports, and increasing tension over resource development in off-shore areas. The snapshot is both promising and bleak.

Current U.S. ocean laws and policies are largely the product of decisions formulated over thirty years ago. At the time, it seemed sensible to fashion a sector-based framework for U.S. oceans policy that divided ocean management tasks along neat lines such as fisheries, marine mammal protection, shipping and ports, scientific exploration, and resource development. Creation of this framework, however, predated the major advances in environmental protection that have been accomplished since then on both a national and international scale. Nor could this framework have anticipated the advent of globalization and the profound ways in which this trend has affected how the U.S. and other nations use and appreciate our ocean and coastal resources. Today, accordingly, it is widely recognized that these sector-based programs are outdated because they fail to recognize and address the inherent interdependence of these activities as part of a collective ecosystem.

Attention to these concerns was the focal point for the substantial work of two recent blue-ribbon commissions, the congressionally chartered U.S. Commission on Ocean Policy and the Pew Oceans Commission. Each commission engaged in a lengthy and multi-stakeholder evaluative process that culminated in the release of two extensive reports documenting the critical and timely need for reform and

modernization of U.S. oceans policies, both domestic and international. The scope of the policy prescriptions in these reports is impressive and includes recommendations to better manage marine health and life; ocean ecosystems, biodiversity and resources; oil, gas, other mineral and pharmaceutical exploration and development; pollution and water quality, including the well-documented threat from non-point-source runoff; international trade and treaties; science and public education; and coastal development, including estuary and wetland impacts. While focused on constructively critiquing domestic ocean laws and policies, the reports also recognize the inherently international character of ocean resource management, and strongly urge the United States to regain its international leadership position by acceding to the UN Convention on the Law of the Sea ("UNCLOS").

As a result, there is unparalleled consensus today that, notwithstanding our economic prowess and our robust environmental laws, U.S. oceans policy needs a major overhaul. Thoughtful change is imperative if we are to effectively address the urgent threats facing our oceans and coasts, while at the same time appropriately exploring and developing the exciting economic opportunities that these resources will, if managed properly, continue to offer.

This article does not attempt to tackle the hundreds of complex and controversial recommendations stemming from the work of the commissions. Instead, our focus is on two aspects of oceans resource policy – one domestic, the other international – that are poised for major changes. The first area that this article summarizes relates to the near-term changes in off-shore renewable energy and alternative use development that will result from provisions in the Energy Policy Act of 2005. The second area that we examine, which will run in the next issue of MCC, relates to current efforts to address the international law framework governing marine genetic

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resources in the deep ocean. Both topics are of vital commercial and environmental interest to U.S. and global companies, governments and communities, and help to illustrate the challenges and opportunities that will arise as we struggle to modernize our approach to ocean resources.

#### **New Development Of Off-Shore Renewable Energy And Alternative Uses**

The Outer Continental Shelf Lands Act ("OCSLA") provides for development of oil and gas resources on off-shore public lands ("OCS"). The initial years of the OCSLA resulted in the lease of certain areas off the Gulf, Atlantic and Pacific coasts for oil and gas exploration and development, and today, this development supplies approximately 25 percent of the natural gas and 30 percent of oil produced in the U.S. Over the years, and in response to various political events, Congress tightened the environmental standards applicable to such leases while also limiting the actual areas of the OCS available for new leases. The result today is that no new areas are available for oil and gas exploration or development until the current moratoria expire in 2012 (assuming that these are not renewed or lifted prior to that time). The Energy Policy Act of 2005 (P.L. 109-58, Aug. 8, 2005) ("the Act") expressly retains the *status quo* for OCS oil and gas development.

At the same time, the Act contains new authorities designed to facilitate renewable energy production on these public lands. Specifically, Section 388 of the Act provides to the Department of Interior ("Interior") new authority to grant leases, easements or rights-of-way for renewable energy exploration and development. In addition, Interior is designated as the lead federal agency for coordinating the regulatory and permitting processes for such uses. Finally, the Act seeks to create opportunities for existing energy production facilities, such as offshore rigs, to continue productive use for other purposes such as research, aquaculture and renewable energy production. The Minerals Management Service ("MMS") within Interior has managed the OCS oil and gas leasing program since 1982 and has been placed in charge of implementing the new law.

With these changes, the Act increases the likelihood of research and commercial access to valuable ocean resources within the OCS. This includes mineral resources such as methane hydrates as well as non-mineral resources, such as waves and wind, to harness for energy with leading-edge technologies. Non-energy alternative uses might include research and development access for exotic non-mineral resources like the genetic material of "extremophile" organisms in the deep ocean. The Act contains required economic, environmental, and legal criteria by which Interior must evaluate any new authorized use of the OCS, and directs the promulgation of regulations to memorialize these require-

Section 388 poses interesting challenges to MMS and affected interests because it overlays these new authorities onto the existing patchwork of regulatory programs that currently affect activities in the oceans. For example, MMS interprets its new responsibilities to include the assumption of federal oversight of existing offshore projects, such as proposed wind farms and aquaculture sites. Many if not all of these projects are controversial in the communities where they have been proposed, and have already experienced varying regulatory involvement by the Corps of Engineers, the Environmental Protection Agency, and a myriad of state and local governmental and community interests under established federal laws such as NEPA, the Clean Water Act and the Coastal Zone Management Act. Whether and to what extent these existing laws apply to such projects has been a core controversy. Some projects are the subject of court decisions and others are in the middle of or have completed environmental review and permitting activities. How successfully MMS steps into these muddy waters with its enhanced role will be instructive in evaluating whether the changes in these OCS authorities, without corresponding changes in laws such as NEPA, will streamline and effectuate alternative energy projects in ways that Congress and others envisioned.

At the same time, MMS is embarking on what promises to be an extensive and far-ranging rulemaking to implement its new responsibilities. In particular, MMS published an Advanced Notice of Proposed Rulemaking ("ANPM") on December 20, 2005 (70 Fed. Reg. 77345) to solicit views from interested persons on how it should proceed to implement Section 388. The ANPR sought input on a variety of issues directly related to the criteria established under Section 388 by which MMS must evaluate new uses on the OCS, including means of developing and providing access, whether to affirmatively designate areas of the OCS for certain types of development based on research and data or merely respond to specific proposals for new uses in specific areas, how to ensure fair competition among existing and new uses and minimize multi-use conflicts, how to value and assure a fair return in establishing costs associated with new uses, how to incorporate environmental requirements into any new leasing program, and how to balance environmental and energy needs. Given this broad agenda, the comments submitted in response to the ANPM are unsurprisingly far-ranging in their recommendations.

Finally, Interior will also engage with the National Academy of Sciences, under Section 1833 of the Act, to develop a report to Congress that addresses some of the very things MMS is beginning to undertake. Thus, the joint study will provide a summary and recommendations on the economic potential for developing wind, solar, and ocean energy resources on federal land and the Outer Conti-

ental Shelf, as well as changes that might be needed in federal laws and regulations to effectuate such development.

The new OCS authorities are one of the first concrete legal changes that Congress has made in response to the strong call for an updated national oceans policy. While it is not surprising, in the current political climate, that the initial effort to develop new oceans law involves both national energy as well as national environmental policies, it remains to be seen whether this construct proves helpful or harmful to reconciling the opportunities and risks that this new initiative presents. As this process unfolds, however, it is imperative that commercial interests with an economic stake in this debate – and that includes oil and gas as well as alternative energy groups, in our view – stay abreast of and involved with MMS's exercise of its new authorities over the OCS.

#### **Current Challenges Regarding Law Of The Sea Convention**

These new resource developments on the continental shelf must also be understood in the context of the international legal framework governing the oceans. Roughly 15 percent of the U.S. continental shelf extends beyond 200 miles from the coastline. Under UNCLOS, the United States is entitled to sovereign rights over the exploration and exploitation of the natural resources on the continental shelf, out to the edge of the continental margin. But UNCLOS requires that countries delimit their continental shelf claims beyond 200 miles and submit related data to the Commission on the Limits of the Continental; it also imposes a mechanism for the sharing of value derived from production of mineral resources. The U.S. oil and gas industry has developed deep-water drilling technology that puts resources in these areas within reach, and the Act contains incentives to develop such technology in these areas. Nevertheless, the United States has not delimited its shelf and, as a non-party to the Convention, has no representative on the Commission. Other countries, meanwhile, have begun to delimit their continental shelves, including a large Russian claim in the Arctic.

The resulting legal uncertainties inhibit the substantial private-sector investments that are necessary to develop the significant economic potential of this resource. Unfortunately, the prospects for U.S. accession to UNCLOS remain uncertain. Despite the support of the oceans commissions, the White House, all relevant U.S. agencies, all major commercial and industrial sectors, and key U.S. senators (including Richard Lugar, the chairman of the Foreign Relations Committee), the Senate has not yet scheduled a floor vote to give advice and consent to U.S. ratification. There is broad consensus that this ongoing failure to act threatens U.S. international leadership in this dynamic area as well as U.S. economic interests.